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No. 06-341

IN THE
SUPREME COURT OF THE UNITED STATES

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit federation of 49 state associations of school boards across the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA also represents the nation's 95,000 school board members who, in turn, govern approximately 15,000 local school districts that serve more than 47 million public school students. The NSBA Council of School Attorneys is the national professional association for attorneys who represent school districts. NSBA is dedicated to the improvement of public education in America and has long been involved in advocating for reasonable application of federal non-discrimination laws in a manner that preserves the rights of public employees while recognizing the special concerns and operational realties of public school systems.

NSBA submits this brief to emphasize the significant adverse impact that the Tenth Circuit's decision, if left intact, would have on the operation of our nation's schools.

SUMMARY OF ARGUMENT

This case presents the strong possibility of serious unintended consequences for the nation's school districts if this Court renders a decision that fails to recognize and account for the particular legal requirements and governance realities that dictate school board operations.

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[1] This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

Under many state statutes, school boards are the final decision-makers in many school employment decisions, including hirings, firings, and promotions, that are subject to Title VII and other non-discrimination statutes. At the same time, as a matter of sound governance, school boards generally are not involved in the day-to-day operation of schools and necessarily rely on the judgment and recommendations of their school administrators in rendering these personnel decisions. If anything, current trends are toward less board involvement in the operational minutiae of school districts, with boards focusing more of their attention and oversight on the broad academic and civic mission and sound overall operations of public schools. School districts also have put in place many other procedural safeguards to protect employees from discrimination.

In requiring an employer to investigate for possible racial bias in a subordinate's personnel decision, even in the absence of any evidence of such bias, the Tenth Circuit's approach to this case fails to account for these realities among school boards and similarly situated employers. The Tenth Circuit's holding is unsupported by Title VII itself or by this Court's holdings, and its apparent rationales—that employers may intentionally isolate final decision-makers to avoid responsibility for bias and that bias could be unearthed if employers tried harder—are irrelevant in the school board context. Affirming the Tenth Circuit would ignore—and indeed undermine—the existing safeguards school boards utilize.

ARGUMENT

I. The Practical Realities of School Board Operations Make It Unreasonable To Impute the Unsanctioned, Discriminatory Animus of Subordinates to School Boards Acting as Impartial, Actual Decision-Makers.

A. A school board's limited and removed role in personnel actions makes it unlikely that a board will uncover racial animus of subordinates.

The statutorily defined role and responsibilities of school boards and the operational realities of public school systems create obstacles that limit the probability that school boards charged as final decision-makers in employment matters will discover the racial animus of subordinates who may have been part of the personnel process. These obstacles make it unreasonable to impose liability on school boards for the unknown racial animus of subordinates.

School boards are responsible for governing the school district and do so mostly through policy-making, not direct involvement in the daily operation of schools.[2] In most jurisdictions, school boards intersect with personnel actions in two primary ways. First, school boards are responsible for promulgating rules and policies that set the terms of employment and govern employee behavior, including discipline.[3] Second, by virtue of state law, in most

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[2] BECOMING A BETTER BOARD MEMBER 7 (National School Boards Association 2006). ("A major function of any school board is to develop and adopt policies that spell out how the school district will operate.").

[3] *Id.* at 8. ("The board is responsible for establishing policy governing salaries and salary schedules, terms and conditions of employment, fringe benefits, leave, and in-service training.").

states school boards are the actual decision-makers in employment matters, including hiring and firing employees.[4]

School boards do not directly manage and supervise employees—administrative functions delegated primarily to the superintendent.[5] In fact, most school boards have no role in evaluating employees, in investigating employee complaints, or in developing recommendations for hiring, discipline, or termination.[6] Instead, in most instances, the

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[4] *Id.* at 170. ("In most states, the school board is the ultimate employer of all district employees—a fact that carries the appropriate legal baggage of responsibility and accountability."). *See, e.g.*, WIS. STAT. § 118.22(2) (2006) ("No teacher may be employed or dismissed except by a majority vote of the full membership of the board."); VA. CODE ANN. § 22.1-315 (2006) ("Nothing in this section shall be construed to limit the authority of a school board to dismiss or place on probation a teacher or school employee pursuant to Article 3 § 22.1-306 *et seq.* of this chapter."); LA. REV. STAT. ANN. § 42:1165A (2006) ("All job actions based upon the causes for disciplining or dismissal of teachers or other public school employees, as may be now or hereafter set forth in the state tenure statutes, shall remain under the exclusive jurisdiction of the appropriate parish or city school board."); MO. ANN. STAT. § 174.090 (West 2006) ("A majority of the members of the board shall constitute a quorum for the transaction of business, but no appropriation of money nor any contract which shall require any appropriation or disbursement of money, shall be made, nor teacher employed or dismissed, unless a majority of all the members of the board vote for the same."); CONN. GEN. STAT. ANN. § 10-220(a)(3) (2007) ("Each local or regional board of education ... shall employ and dismiss the teachers of the schools of such district subject to the provisions of sections 10-151 and 10-158a."); KY. REV. STAT. ANN. § 164.340 (West 2006) ("A majority of the members of the board shall constitute a quorum for the transaction of business, but no appropriation of money shall be made nor any contract that requires a disbursement of money shall be authorized, and no teacher employed or dismissed, unless a majority of all the members of the board vote for it.").

[5] BECOMING A BETTER BOARD MEMBER at 7. ("But although boards set policy, they do not carry it out. The responsibility for implementing policy is delegated to the superintendent of schools.").

[6] *Id.* at 174. ("Prudent boards set out policy guidelines for evaluating their employees, just as they do for evaluating the superintendent. Boards almost always delegate the actual evaluating to the

school district administration is responsible for the day-to-day operations of the school district, including managing employees.[7] Ultimately, school boards rely on the recommendations and input of administrators to inform their hiring and firing decisions. Typically the superintendent relies on associate superintendents, area directors, principals, and supervisors to evaluate, supervise, train, and discipline school district employees and recommend employees for hiring and termination.

Where employees have no property or liberty interest in their employment,[8] or no statute or collective bargaining agreement requires a hearing, school boards generally will rely only on the recommendation of subordinates in making a decision to terminate. In that instance, a school board will consider the facts as presented by the superintendent or other administrator when reaching a decision. Unless an issue of discrimination is raised by the affected employee, a school board will only act based on the facts presented to it. As a matter of course, a school board at that point will not be in a position to identify *sua sponte* whether racial bias played any part in the recommendation.

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superintendent, however, or to other members of the administrative or supervisory team.").

[7] *Id.* at. 8. ("Unless otherwise specified in state statutes or board policy, a board exercises daily supervision and control primarily through its chief administrator and does not directly deal with staff members employed to assist the superintendent in implementing board directives.").

[8] School district employees have a property interest in their job by virtue of state law or a collective bargaining agreement granting them tenure or contract rights to continued employment. Teachers in most states have tenure rights after two or three years of employment. *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Updated for 1998 (1998), http://www.ecs.org/clearinghouse/14/41/1441.htm. About two-thirds of states have collective bargaining laws, many including all public employees. *See* Education Commission of the States, State Collective Bargaining Policies for Teachers (2002), http://www.ecs.org/clearinghouse/ 37/48/3748.pdf.

Relying on the information and recommendation of a superintendent in this instance, even if doing so does not reveal racial animus where it might exist, is not unreasonable. First, the school board is accustomed to relying on information from the superintendent to inform its policy-making and decision-making functions.[9] Second, the school board has good reason to rely on a superintendent's recommendations in general. In the majority of jurisdictions, the school board has carefully selected the superintendent to be its top administrator and expects him or her to be well-versed in and to act in accordance with all the district's policies, including its anti-discrimination policies.[10] And where elected, the superintendent is generally charged by law "to advise and counsel with the district school board on all educational matters and recommend to the district school board for action such matters as should be acted upon."[11] Third, the school board has good reason to rely on a superintendent's recommendation regarding employment matters. The superintendent, either through directly supervising the employee or through working with the employee's direct supervisor, is in a far better position than the board to understand and report the facts supporting the reasons for the recommended termination and the credibility of the employees involved.

Where employee property interests are at stake, whether by virtue of state statute or through a collective bargaining agreement, school boards would be in a better position to determine whether racial bias was a factor because school boards are required to hold hearings. In a

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[9] BECOMING A BETTER BOARD MEMBER at 129. ("Your superintendent should provide you the information you ask for when it is available. If it is not easily available, your superintendent should explain what effort is required to obtain it.").

[10] *Id.* at 135. ("Selecting a new superintendent is perhaps the most important decision your board will ever make.").

[11] *See, e.g.*, FLA. STAT. § 1001.49(2) *et seq.* (2006).

hearing to contest an adverse employment action, an employee can raise issues of discrimination or bias and have a full and fair opportunity to have those claims impartially considered and resolved, thus rendering it unnecessary to impute any discriminatory intent of subordinates to the actual decision-maker.

But even the availability of these hearings does not necessarily ensure disclosure to the board of potential racial animus by subordinates. *See, e.g., Mateu-Anderegg v. School Dist. of Whitefish Bay*, 304 F.3d 618 (7th Cir. 2002) (teacher recommended for non-renewal withdrew request for a hearing, stating she did not agree with reasons given for non-renewal, but failing to raise any concerns about discrimination); *Kramer v. Logan County Sch. Dist.*, 157 F.3d 620, 624 (8th Cir. 1998) (school board held a five-hour hearing over non-renewal of teacher, at which teacher represented by counsel never presented any allegations or evidence of gender discrimination).

In the case at bar, the Tenth Circuit cited two justifications for holding the employer liable for subordinate discrimination of which the actual decision-maker was unaware, neither of which accurately reflects the practical challenges school boards and other public employers face when making employment decisions. First, the Tenth Circuit reasoned that imputing subordinate bias to the employer would deter employers from establishing elaborate chain-of-command systems where actual decision-makers are purposely insulated from information about the racial bias of subordinates specifically to avoid liability under Title VII. *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 486 (10th Cir. 2006). This concern is misplaced in the school board context. School boards, which by their function and purpose are removed from daily employment situations, make hiring and firing decisions because state law requires them to do so, not because this system best protects them from liability for unlawful discrimination. Likewise,

the appropriate distance of school boards from the day-to-day operations of the school district, which impedes boards from uncovering the racial animus of subordinates on whom they must necessarily rely for relevant information, derives from the statutory responsibilities and operational realities of school systems and not from any intent to avoid liability under federal non-discrimination laws.

Second, the Tenth Circuit seemed to assume that if actual decision-makers just tried harder to uncover discriminatory animus, they would find it where it exists. *Id.* ("Indeed such claims have the salutary effect of encouraging employers to verify information and review recommendations before taking adverse employment actions against members of protected groups—particularly if, as we have held, an employer can escape liability entirely by performing an independent investigation."). However, as *Mateu-Anderegg*, 304 F.3d 618, and *Kramer*, 157 F.3d 620, illustrate, even the availability of a full evidentiary hearing prior to making an employment decision will not necessarily reveal evidence of discriminatory bias.

B. Holding school boards liable for the unsanctioned, discriminatory acts of subordinates when the affected employee failed to inform the school board about the discrimination undermines proactive measures to advance anti-discrimination efforts and encourages needless litigation.

The primary purpose of Title VII is to prevent discrimination. *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-806 (1998) ("Although Title VIII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination,' [citations omitted], its 'primary objective' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.") The

preventive purpose of Title VII is not advanced by a rule that allows an employee to sue his unsuspecting employer where (i) the ultimate decision-maker actually did not harbor discriminatory animus toward the employee and (ii) the employee declined an opportunity to inform the ultimate decision-maker that the lower-level supervisor harbored such bias. As discussed below, this Court should reject a "cat's paw" theory of imputed liability in cases where the employee unreasonably declined to share with the ultimate decision-maker that discrimination was a genuine concern that needed to be investigated. *See generally Kramer*, 157 F.3d at 629 (Hansen, J., dissenting) (expressing concern that employee had "sandbagged" her employer by not revealing concerns about discrimination during a five-hour school board hearing and then "blindside[d]" board with subsequent Title VII lawsuit). Where school boards have numerous mechanisms in place for receiving and responding to complaints of discrimination, holding the school board liable for the racial animus of a subordinate about which the board knew nothing encourages litigation by allowing employees to circumvent the school system's non-discrimination policies and procedures until it is too late for the school system to take corrective action. Prompting needless litigation where viable administrative remedies exist serves no public purpose and hinders rather than forwards the goals of Title VII.

Aside from formal hearings related to employment actions, concerns about discriminatory actions also could be raised at regular school board meetings where members of the community, including school district employees, can address the board directly by asking to be placed on the agenda or speaking during the public comment period.[12] Moreover, school boards typically have complaint procedures that any citizen can use to raise their concerns

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[12] BECOMING A BETTER BOARD MEMBER at 44. ("Your board should have a policy on how citizens can request speaking time, when they can speak, how many citizens can speak, and how long they can speak.").

through the district's chain-of-command, ending with consideration by the board. If a person raising a complaint is not satisfied by working with administrators, he or she can ultimately raise the issue with the entire school board.

Even more to the point, school boards, as public employers and recipients of federal funds, are bound by numerous federal and state constitutional and statutory equal protection and non-discrimination mandates, including Title VII.[13] In an effort to comply with these wide ranging laws, virtually all school districts adopt non-discrimination policies with respect to provision of services and employment practices,[14] develop complaint and administrative procedures specifically for employees,[15] and disseminate these policies and procedures through various means including district policy manuals, employee handbooks, and in service training. These policies typically include procedures for reporting and investigating discrimination complaints to ensure employees have an

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[13] Among the federal non-discrimination laws that apply to school districts are: Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*.

[14] BECOMING A BETTER BOARD MEMBER at 171 (Noting that a typical hiring policy will include an equal employment opportunity clause and a nondiscrimination statement.).

[15] *Id.* at 177 ("A grievance procedure should begin with an informal attempt to resolve the problem with the employee's immediate supervisor. If the initial step doesn't provide relief the complainant finds satisfactory, most grievance procedures allow for a written complaint and response at the same level. Then, subsequent appeals move along, step-by-step, up through the chain of command. Finally, if the employee still is not satisfied with the administrative response, a typical grievance procedure allows for further appeal in the form of a hearing before the superintendent, or in some cases, before the school board.").

opportunity to have their concerns addressed and resolved at the earliest point possible.

Many school board policies oblige all employees, including supervisors, to report discriminatory behavior in order to ferret out unlawful discrimination from the outset of an impermissible act. For these processes to be most effective, employees must come forward and raise discrimination issues with the employer *before* filing a lawsuit. This Court recognized the importance of encouraging employees to bring forward evidence of discrimination immediately when it limited employer liability under Title VII to the extent the employer takes reasonable steps to prevent and address discrimination by encouraging employees to report discrimination. *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) ("To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.").

Allowing an employee to bring a Title VII claim where the employee never informed the actual decision-maker about possible racial animus of a subordinate, despite the availability of mechanisms to do so, would encourage employees to disregard the reporting mechanisms, denying their workplace colleagues and employers the benefit of having such policies in the first place. Furthermore, by providing the employee no incentive to bring forth a claim for the employer's immediate consideration and resolution, the employer is denied the opportunity to remediate the alleged discriminatory acts.

An employee who skips an opportunity to raise concerns about discrimination should not be rewarded with a federal cause of action for discrimination premised on a "cat's paw" theory of liability. Yet this is exactly what happened in *Mateu-Anderegg*, 304 F.3d 618, and *Kramer*, 157 F.3d 620, 624, and it is what is likely to happen in the

future if the Court embraces the Tenth Circuit's analysis in *BCI*. In *Mateu-Anderegg*, the plaintiff declined the opportunity for a statutory non-renewal hearing before the school board, yet the court of appeals still held that the principal's alleged bias was attributable to the school board. Similarly, in *Kramer*, although the teacher participated in a five-hour hearing before the school board, neither she nor her attorney ever uttered a word about discrimination; nonetheless, the two-judge majority affirmed a $125,000 judgment in her favor. While the court found it "troubling" that the teacher was silent about discrimination at the lengthy board hearing, the court nonetheless decided it was a jury question whether the school board had "accurately assessed" the teacher's situation. *Id.* at 624. A dissenting judge found that the board's review had been thorough, not perfunctory. *Id.* at 626.

Imputing racial bias to a school board, or even requiring a school board to know that racial bias existed, while denying the board the ability to use proactive measures to address discrimination, shifts the impetus away from a proactive and collaborative resolution towards needless adversarial litigation.

II. Requiring a School Board To Investigate Discriminatory Animus on the Part of Informing Subordinates To Avoid Liability Is Unsupported by Title VII and Other Precedent, and Imposes Unnecessary and Counter-Productive Burdens.

According to the Tenth Circuit, an employer can avoid liability for a subordinate's racial animus by independently investigating the allegations against the employee.

> . . .[B]ecause a plaintiff must demonstrate that the actions of the biased subordinate caused the employment action, an employer can avoid liability by conducting an independent investigation of the allegations against an employee. In that event, the employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated. . . . [S]imply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory.

BCI, 450 F.3d at 488.

There is no investigation requirement under Title VII, and one should not be judicially imposed on school boards. As more fully explained below, neither the plain language of the statute nor Supreme Court precedent supports imposing an investigation requirement on employers. Furthermore, other policy factors weigh against it. First, the scope of an employer's obligations in conducting "an independent investigation of the allegations against an employee" remains unclear under the Tenth Circuit's decision. Second, conducting either type of investigation is burdensome because every employee belongs to at least two protected classes (race and sex). This means under the Tenth Circuit's rationale, an investigation would be virtually mandatory for every adverse employment decision based on subordinate input.[16] Third, requiring an investigation discounts the

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[16] When determining how to handle claims of subordinate bias, lower courts have applied the same legal principles to Title VII, ADEA, and ADA cases, meaning whatever holding this Court reaches in this case lower courts will likely apply to cases brought under other employment statutes. *See Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004), (noting Title VII and the ADEA define

other—likely more effective—measures school boards take to eradicate discrimination. Finally, practically speaking, an investigation requirement actually may be unproductive or counterproductive in uncovering subordinate bias.

A. Neither the plain language of Title VII nor prior Supreme Court precedent supports imposing an investigation requirement on employers.

Requiring employers to investigate all adverse employment actions to make sure they comply with Title VII is a dramatic change for employers. This requirement has no grounding in the plain language of Title VII. In fact, the failure to investigate, in and of itself, is not an act of discrimination. *See Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 290 (7th Cir. 1999) (finding the failure to investigate a harassment complaint was not evidence of pretext in a Title VII race discrimination claim where the employee never told his employer that the alleged harassment was race-related); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000) (finding no discrimination on the basis of sex for failing to investigate alleged sexual harassment where none of plaintiffs complaints were actually about sexual harassment).

In other employment contexts, this Court has carefully limited the outer contours of the employer's duty to investigate to a duty to determine whether *a violation of law has occurred* when the employer has some prior reason to suspect possible misconduct. In *Waters v. Churchill*, 511 U.S. 661 (1994), a plurality of this Court in considering the First Amendment free speech claim of a terminated employee determined that an employer is obligated to investigate if the supervisor knows "that there is a substantial likelihood that what was actually said was protected

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"employer" exactly the same); *Russell v. McKinney*, 235 F.3d 219 (5th Cir. 2000) (ADEA case); *Iduoze v. McDonald's Corp.*, 268 F.Supp.2d 1370 (N.D. Ga. 2003) (ADA case).

[speech]." *Id.* at 677. Similarly, in *Ellerth*, 524 U.S. 742, this Court recognized employers have a duty to respond to specific complaints of harassment. The Court held that in cases not involving a tangible employment action, a defending employer may raise an affirmative defense composed of two parts: (i) proof that it exercised reasonable care to prevent and correct promptly any harassing behavior, and (ii) proof that the employee unreasonably failed to take advantage of "preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765.

In both *Waters* and *Burlington,* the duty to investigate was triggered by some specific allegation that an employee's particular legal rights were at stake. The purpose of the employer's inquiry in both cases was to determine whether a federal law had been violated. The Tenth Circuit's decision departs from this focused approach. Rather than require an investigation only in those instances in which there is a reasonable concern about potential discrimination, it requires the actual decision-maker, in an effort to avoid liability, to conduct an "independent investigation" even if there is no hint of discrimination in the conduct of the subordinate supervisor. This is flawed analysis, because the failure to conduct an "independent investigation" is not, in and of itself, an act of discrimination.

In *BCI*, the Tenth Circuit reasons that absent such a universal investigation requirement, employers "might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness." 450 F.3d at 486. But the solution to this potential problem is not to cast a wide net and impose vicarious liability on all employers for a subordinate's bias. If the employee being terminated or disciplined has a reason to believe that the subordinate supervisor was biased, then he or she should share this information with the actual decision-maker either informally or through an existing grievance or

appeal process. Employers then should be held accountable if they fail to address on a case-by-case basis those allegations of discrimination brought to their attention.[17]

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[17] Courts have appropriately limited this accountability inquiry to determining whether the employer engaged in intentional discrimination in failing to investigate the allegations and not in second guessing the employer's reasonable business judgments. "As we have often stated—to a host of deaf ears, it often seems—the court is not a 'super-personnel department' intervening whenever an employee feels he is being treated unjustly." *Cardoso v. Robert Bosch Corp.*, 427 F.3d 429, 435 (7th Cir. 2005). "The aggrieved employee may seek recourse in federal court for discrimination only for the forbidden reasons set forth in Title VII, not for common workplace disputes or poor, nonsensical, or even heavy-handed management techniques or decisions." *Id.* at 436; *see also Riser v. Target Corp.*, 458 F.3d 817, 821 (8th Cir. 2006) (explaining that federal employment laws "have not vested in federal courts authority to sit as super-personnel departments reviewing wisdom or fairness of business judgments made by employers, except to extent that those judgments involve intentional discrimination"), quoting *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995); *Young v. Dillon Co.*, 468 F.3d 1243, 1250 (10th Cir. 2006) (stating that purpose of pretext analysis is "to prevent intentional discriminatory hiring practices," not to enable judges to "act as a 'super personnel department' second guessing employers' honestly held (even if erroneous) business judgments") (citation omitted); *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 626 (6th Cir. 1996) (law "does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with") (citation omitted). Finally, this Court expressed a similar sentiment in *Bishop v. Wood*, 426 U.S. 341, 350 (1976) ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.").

B. Requiring a school board to investigate before taking any adverse employment action is burdensome, duplicative of other steps school boards have taken to eliminate discrimination, and may not be productive.

In addition to being unsupported by Title VII, a mandatory investigation requirement before any adverse employment action would be particularly burdensome on school districts. School administrators and other managers will find themselves engaging in defensive employment practices that will increase employer costs, either through the hiring of additional human resources staff and independent investigators or through the adoption and implementation of even more rigorous grievance and appeal policies that consume countless hours of time searching for an inflammatory where there is neither "smoke nor fire."[18]

Under the law in many states, the school board is the actual decision-maker when determining whether to hire or fire employees. In the case of terminating at-will employees, the school board generally will rely entirely on information from subordinates because school boards do not manage or interact with most school employees, except high-level administrators.[19] Under the Tenth Circuit's ruling, the board

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[18] The nation's employers make thousands of decisions every week; presumably most do not involve discrimination. According to the EEOC, 27,238 charges of racial discrimination were filed nationally in 2006, and 17,324 of these were found to lack reasonable cause. *See* EEOC Enforcement Statistics, http://www.eeoc.gov/stats/race.html.

[19] School districts in collective bargaining states and school district in states where teachers are protected by teacher tenure laws are accustomed to holding hearings for teacher terminations, and of course in this instance investigating the reasons for a termination is easier. However, as *Mateu-Anderegg*, 304 F.3d 618, and *Kramer*, 157 F.3d 620, illustrate, such investigations do not necessarily produce evidence of alleged discriminatory animus.

would be compelled to make an affirmative inquiry in every instance.[20]

School systems also would be subjected to more unworkable burdens because Title VII protects employees against any adverse employment action, not just terminations—including failure to hire or promote. 42 U.S.C. § 2000e-2(a)(2). Even more onerous than a requirement that school boards investigate all recommendations to *terminate*, would be a requirement that boards investigate all recommendations to *hire* a particular individual over all the other applicants. In a typical school district, school administrators solicit applicants, select candidates to interview, conduct interviews, and recommend employment of particular candidates to the board. The board then may meet the recommended candidate and decide whether to hire him or her. If this Court adopts the Tenth Circuit's holding, would a school board have an obligation to investigate the facts surrounding a subordinate's recommendation to hire each employee? If so, what kind of specific inquiry would a board have to make to support a defense that there was no subordinate discrimination? Such an inquiry would, in any case, amount to proving a negative and ultimately would not serve the interests of Title VII in deterring discrimination any more effectively than proactive anti-discrimination policies.

If the school board, as the actual decision-maker, is required to reach behind the facts presented to determine on its own whether or not there are extant indicia of discrimination for every adverse employment action it considers, the board's entire function may be subsumed by

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[20] In the private sector this may pose less of a problem where a direct supervisor generally has the authority to terminate, hire, or promote an employee based on the supervisor's first hand knowledge of an employee and situation rather than relying on subordinates when making adverse employment decisions.

time-consuming and ultimately unnecessary hearings. The board's ability efficiently to handle even the most routine employment decisions, let alone its other governance functions, would be severely hampered. As part of their governance function, school boards take affirmative steps to ensure that the subordinates recommending the adverse employment action do not act based on racial animus and that supervisors have taken steps necessary to be satisfied that the recommended adverse employment action is justified pursuant to state and federal law and school board policy. These steps include careful screening of administrator candidates, non-discrimination employment policies, employee training, internal complaint procedures, and the accessibility of the school board to receive complaints at school board meetings. If school boards must disregard the recommendations of their administrators and conduct their own investigation, particularly when hiring employees, the untenable result will be to shift the administrative personnel role to the school board itself. [21]

The Tenth Circuit's theory that "simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory," *BCI*, 450 F.3d at 488, is unrealistic in practice. Indeed, it was completely unavailing in *Kramer*, where the teacher was given a chance to give her version of events during a five-hour school board hearing. Similarly, other types of investigations might reveal disparities between a supervisor's and an employee's version of the events leading up to a termination, but they would not necessarily uncover the supervisor's racial bias, thus leaving the actual decision-maker to assess credibility, but no more able to identify and short circuit any improper motives the supervisor might harbor. If investigating an employee's side of the story

[21] In jurisdictions where state law pointedly delineates school board and administrator roles, a ruling to this end would have a deleterious effect on statutorily established roles.

generally fails to reveal racial animus, there is no practical justification for deeming this a requirement under Title VII.

C. Requiring a school board to investigate possible discriminatory animus whenever a subordinate has recommended an adverse employment action discourages employees from fulfilling their duty to minimize the harm of discrimination.

Where the employer has already established preventive and corrective measures, such as complaint, grievance, and training procedures aimed at exposing and deterring improper discrimination, the Tenth Circuit's investigation requirement negates any responsibility on the part of employees to avail themselves of the employer's "preventive and remedial apparatus." This Court has held that employers who "have provided a proven, effective mechanism for reporting and resolving complaints of [discrimination], available to the employee without undue risk or expense. . ." should not be held liable where the plaintiff unreasonably fails to use the preventive opportunities made available by the employer. *Faragher*, 524 U.S. at 806. In so ruling, this Court recognized that avoiding the harm that Title VII seeks to prevent is a joint responsibility of employers and employees. This Court should reaffirm this principle and reject a rule that would place an inordinate burden on employers by requiring them to presume and search for discriminatory animus even where there is absolutely no indication that any exists.

As explained in Part II.B., *supra*, such a rule would be particularly burdensome for school boards that almost always rely on subordinates for information before taking tangible employment action. Screening every employment action for discriminatory (not just racial) bias[22] would likely

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[22] *See, supra*, n.16.

require innumerable hearings with inquiries of all informing subordinates about their biases before making any decision. Even where state law, collective bargaining agreements, or constitutional provisions already require a hearing before an employee is terminated, the focus of the hearings would shift from determining whether just cause for the termination exists and whether the employee received any remedial opportunities to which he or she may have been entitled to searching for the potential, if not evanescent, discriminatory animus of any other employee informing the board's decision. The employer's burden in chasing this fleeting dragon in the sky would be inordinate, unreasonable, and unnecessary.

While the law requires actual decision-makers to reasonably investigate[23] and respond to employee complaints

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[23] This Court recognized in *Waters* that an employer's investigation could be deemed reasonable even if others might disagree with it. "Of course, there will often be situations in which reasonable employers would disagree. . .[over] how much investigation needs to be done, . . . "[o]nly procedures outside the range of what a reasonable manager would use may be condemned as unreasonable." 511 U.S. at 678. Lower courts have been sympathetic of the imperfections inherent in any investigation. For example, the Seventh Circuit recently rejected a claim by a plaintiff who had been fired following a "shoddy" investigation of a sexual harassment complaint. *See Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 418 (7th Cir. 2006) (stating that question in discrimination case is not "whether the employer was mistaken, cruel, unethical, out of his head"). In fact, case law illustrates that employer mistakes, by themselves, ordinarily will be insufficient to raise a question of fact on the questions of discrimination or pretext. *See, e.g., Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253 n. 5 (11th Cir. 2001) (stating that pretext means "more than a mistake on the part of the employer") (citation omitted); *Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 403 (5th Cir. 2001) (stating that school's "mistaken understanding" regarding operation of certain employment procedures would not raise issue of fact); *Scales v. Slater*, 181 F.3d 703, 711 (5th Cir. 1999) (holding that employer's failure to follow own procedures will not defeat summary judgment unless there is evidence that departures were meant to be discriminatory).

of discrimination, a requirement that employers conduct such an inquiry in the absence of any report of bias would be unproductive or even counterproductive. An actual decision-maker would in most cases be engaging in time consuming and labor intensive inquests to determine a negative, and would remain uncertain that the investigation was thorough enough to satisfy a court. In the absence of any indication at the outset of discriminatory animus, it is difficult to imagine how Title VII's deterrent purposes are served by requiring the school board to engage in such a far flung inquiry before making every employment decision.

Investigating for discriminatory bias in every employment decision may even be counter-productive, because it may discourage employees from becoming whistleblowers, knowing that reporting another employee's behavior will result in an inquiry into their own potential discriminatory motives for disclosing information that may play a factor in an employment decision. Such reticence can have disastrous consequences in a school setting where school administrators may discover employee misconduct, such as inappropriate sexual relationships between employees and students, through other employees reporting their suspicions. *See, e.g., P.H. v. School Dist. of Kansas City,* 265 F.3d 653 (8th Cir. 2001) (other teachers complained to administration that teacher was spending too much time with student, student was frequently tardy and absent from class, and student's grades were suffering); *Doe v. School Admin. Dist. No. 19*, 66 F.Supp.2d 57 (D. Me. 1999) (substitute teacher reported to administration that she saw male teacher dance in sexually suggestive manner with several boys and had heard rumors that teacher had a sexual relationship with student); *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001) (school librarian reported to principal that she saw student sitting on teacher's lap in inappropriate manner).

Finally, investigating for racial animus in all instances, especially where the actual decision-maker has no

reason to believe it exists, may only serve to encourage employees on the brink of termination to manufacture claims of racial bias to avoid termination. A number of the "cat's-paw" cases decided by the lower courts were brought based on surprisingly little evidence of discrimination. *See, e.g., Rose v. New York City Bd. of Educ.*, 257 F.3d 156 (2d Cir. 2001) (age discrimination claim based on supervisor allegedly telling plaintiff twice she could be replaced by someone "younger" and "cheaper"); *Schreiner v. Caterpillar, Inc.*, 250 F.3d 1096 (7th Cir. 2001) (sex discrimination case based on supervisor's statement in an investigation that the female plaintiff's position as "not a woman's area," where the supervisor immediately approved both of plaintiff's requests for a pay increase upon being informed of them). At the very least, such cases illustrate that it would take little effort for a disgruntled employee to misconstrue something innocuous a supervisor said or simply manufacture a discriminatory statement made by a supervisor in an attempt to avoid termination.

CONCLUSION

The vast majority of school districts have anti-discrimination policies and complaint procedures through which employees can report discrimination. Once notified, school districts are obligated to investigate these reports and to take appropriate remedial action where the investigation reveals discrimination has in fact occurred. While these corrective procedures may not perfectly eliminate all discrimination, there is no reason to believe that requiring employers to engage in an extensive investigation each time a subordinate recommends a tangible employment action to the actual decision-maker will be more effective than these measures in advancing Title VII's purposes. For these reasons this Court should avoid a rule that would hold employers, like school districts, that have already taken

reasonable steps to meet their Title VII obligations by adopting, disseminating, and implementing non-discrimination policies that include effective mechanisms for reporting and redressing discrimination complaints, liable for relying on information from subordinates who harbor discriminatory animus unknown to the actual decision-maker.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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